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No. 80-223

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

DONALD D. HOWE, ET AL., *Petitioners*

v.

ALLIED VAN LINES, INC., ET AL., *Respondents*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD DISTRICT

BRIEF OF RESPONDENT ENGEL VAN LINES, INC. IN OPPOSITION

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QUESTION FOR REVIEW

Whether former 49 U.S.C. §22, now 49 U.S.C. §10721 (1980), permits motor common carriers to contract with the United States Government for a limitation of liability for loss or damage to the household goods of members of the armed services, where said household goods are shipped at Government expense and at rates lower than those available to the public, independent of the provisions of 49 U.S.C. §20(11), now 49 U.S.C. §11707 and 10730 (1980).

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BRIEF OF RESPONDENT ENGEL VAN LINES, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

STATEMENT OF THE CASE

The Supreme Court has been requested to review the judgment entered by the United States Court of Appeals for the Third Circuit in this case, *Glenn D. Wilkerson v. Engel Van Lines, Inc. v. United States of America*, and the judgments entered by that Court in eleven other related cases.* In each of these cases, the

*The other cases included in the Petition for Writ of Certiorari are:

Jerry P. Hill, *Petitioner*, *v.* Trans-American Van Service, Inc., *Respondent*.

same critical facts and the same basic legal issues are presented.

The basic legal issue presented by these cases is whether a motor common carrier and the United States Government, as shipper, can lawfully contract for a limitation of liability for damage or loss to a military service member's household goods, binding upon that military service member, when such household goods are shipped entirely at Government expense and at a lower rate which has been made available to the Government by the common carrier because of that very limitation of liability. Both the United States District Court for the Eastern District of Pennsylvania and the United States Court of Appeals for the Third Circuit have concluded that 49 U.S.C. §22 affords the Government and the motor common carrier the freedom to enter into just such a

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NOTE — *(Continued)*

United States Automobile Association, *Petitioner*, *v.* Aero Mayflower Transit Co., Inc. and United States of America, *Respondents*.

Dale DeFrank, *Petitioner*, *v.* Pyramid Van Lines, Inc., *Respondent*.

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United Services Automobile Association, *Petitioner*, *v.* Rocky Ford Moving Vans, Inc., and United States of America, *Respondents*.

limitation of liability, apart from any requirements of 49 U.S.C. §20(11).

In *Wilkerson v. Engel Van Lines, Inc. v. United States of America,* the military service member had his household goods transported by Engel Van Lines, Inc., entirely at Government expense, from Columbus, Georgia to Fort Lee, Virginia. Prior to the move, the military service member was counseled regarding the limitation of liability which attached to the transportation of his household goods at Government expense, and the military service member purchased private insurance to cover any damage or loss resulting from the shipment of his household goods.

In order to transport the military service member's household goods, a contract of carriage was entered into between the Government and Engel Van Lines, Inc. That contract of carriage consisted of the Government Bill of Lading, GBL No. M-2,514,435, and the applicable tender/tariff, GRT 1-Y, filed by Respondent, Engel Van Lines, Inc. As will be discussed, *infra,* the contract clearly provided for a contractual limitation of liability on the subject shipment of 60 cents per pound per article.

SUMMARY OF ARGUMENT

Respondent, Engel Van Lines, Inc., respectfully requests that the Supreme Court not grant the Writ of Certiorari as prayed for by Petitioner, Glenn D. Wilkerson.

It is the position of Respondent, Engel Van Lines, Inc., that both the United States District Court for the Eastern District of Pennsylvania and the United States Court of Appeals for the Third Circuit properly concluded that 49 U.S.C. §22 affords the Government the right to enter into a contractual limitation of liability so as to insure that it will be able to ship at the lowest available rates. Under the provisions of 49 U.S.C. §22, such a limitation of liability may be established apart from any of the requirements of 49 U.S.C. §20(11). The contract of carriage between the shipper, the United States Government, and the carrier, Engel Van Lines, Inc., specifically provided for a limitation of liability to 60 cents per pound per article.

It is further the position of Respondent, Engel Van Lines, Inc., that, contrary to the suggestion made by Petitioner, there is no real conflict between the decisions rendered by the United States Courts of Appeals for the Third and First Circuits, since the decision of the latter Court in *Anton v. Greyhound Van Lines, Inc.*, 591 F.2d 103 (1st Cir. 1978) was rendered without that Court having considered the effect of 49 U.S.C. §22.

ARGUMENT

POINT 1

The United States Court of Appeals for the Third Circuit Correctly Held that the Provisions of 49 U.S.C. §22 Allowed the United States Government, as Shipper, and a Motor Common Carrier to Enter into a Contractual Limitation of Liability which is Binding on the Military Service Member Irrespective of the Provisions of 49 U.S.C. §20(11).

While a fundamental purpose of the Interstate Commerce Act, 49 U.S.C. §1 *et seq.*, since its enactment has been to prohibit discriminations in rate and service by carriers among their customers, *see Texas and Pacific Railway Co. v. Abilene Cotton Oil Company*, 204 U.S. 426, 439-440 (1907), the Act specifically provides that

> "Nothing in this chapter shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States, state, or municipal governments, or for charitable purposes. . ."

49 U.S.C. §22(1). Accordingly, courts have consistently held that rates charged to the Government are outside the regulatory scheme of the Interstate Commerce Act. *See Public Utilities Commission of California v. United States*, 355 U.S. 534, 543, n.10 (1958); *Atchison, Topeka & Santa Fe Railway Co. v. Aircoach Transportation Association*, 253 F.2d 877 (D.C. Cir. 1958); *Great Northern Railway Company v. United States*, 312 F.2d 901, 903 (Ct. Cl. 1962); *Atchison, Topeka & Santa Fe Railway Co. v. United States*, 572 F.2d 843, 844 (Ct. Cl. 1978). *Cf., Nashville, Chattanooga & St. Louis Railway v. Tennessee*, 262 U.S. 318 (1923).

The Comptroller General has considered the precise question which the Petitioner seeks to place before this Court and has concluded that

> "The effect of Section 22 is to exclude from the operation of the Act the carriage, storage and handling of property free or at reduced rates for the United States."

38 Comp. Gen. at 769.

Petitioner, Glenn D. Wilkerson, argues that the Government Bill of Lading in this case did not "make any reference whatsoever to a declared value or released rate or even to any intention to ship on any limitation of carrier liability." (*See* Petitioners' Brief at 10-11) This is not the case. The Government Bill of Lading, GBL No. M-2,514,435, specifically stated in Condition No. 5 that

> "It is mutually agreed upon and understood between the United States and the carrier who are parties to this bill of lading that . . . This shipment is made at the restricted or limited valuation specified in the tariff or classification at or which the lowest rate is available, unless otherwise indicated on the face hereof."

The tariff or classification at which such "lowest rate" was available was GRT 1-Y. Government Bill of Lading, GBL No. M-2,514,435, made specific reference to GRT 1-Y under the heading "Tariff or Special Rate Authorities."

GRT 1-Y was a tender by the Movers' & Warehousemen's Association of America, Inc. to the Government on behalf of some 500 participating carriers, including Respondent, Engel Van Lines, Inc., of reduced rates not available to the general public, for the shipment of household goods of military service members under Government Bills of Lading. The reduced rates of GRT 1-Y were authorized under 49 U.S.C. §22. The tender was accepted by the Department of Defense, effective May 1, 1977. At Item (j)(A), GRT 1-Y specifically provided that

> "Shipments moving on Government Bills of Lading, Government Purchase Orders or Commercial Bills of Lading endorsed to a Government Bill of Lading prior to delivery, will be deemed released to a value of 60 cents per pound per article, unless specifically annotated thereon." (A1)

As nothing appears on the face of the Government Bill of Lading, GBL No. M-2,514,435, to indicate that the shipment was to be made at other than the released valuation rate of 60 cents per pound per article as specified in GRT 1-Y, it is beyond doubt that the Government and the Respondent, Engel Van Lines, Inc., agreed to such a limitation of liability and made such a limitation an express term of their contract of carriage. (*See* Petitioners' Brief at A82)

It may be further noted that the Department of Defense, in addition to requiring the use of a Government Bill of Lading for the transportation at Government expense of a military service member's household goods, also directs the Military Installation Transportation Officer in the preparation of the Government Bill of Lading. DOD 4500.34-R, par. 6009(b)(13)(b) specifically provides that

> "Released valuation will not be shown on the GBL when the governing Military Rate Tender provides that shipments will be deemed released to a value of 60 cents per pound per article, unless otherwise specifically annotated on the GBL." (A2)

Since the governing Military Rate Tender, GRT 1-Y, did specifically provide for such a limitation, the fact that the face of Government Bill of Lading, GBL No. M-2,514,435, may not have carried a specific notation to the effect that the shipment was released to 60 cents per pound per article is entirely irrelevant. *See in this connection, Strickland Transportation Company v. United States*, 334 F.2d 172, 179 (5th Cir. 1964), where the United States Court of Appeals for the Fifth Circuit held

that where the Government Bill of Lading provides that the shipment is to be made

> "at the restricted or limited valuation specified in the tariff or classification at or under which the lowest rate is available, unless otherwise indicated on the face thereof",

there is no need for the Government Bill of Lading to contain a specific released valuation notation.

POINT 2

There is No Actual Conflict between the Decisions of the United States Courts of Appeal for the Third and First Circuits.

Petitioner has asserted that there is a conflict between the decisions of the United States Court of Appeals for the First Circuit in *Anton v. Greyhound Van Lines, Inc., supra,* and the decisions rendered below by the United States Court of Appeals for the Third Circuit. At the time the Third Circuit entered its order in this case and in the eleven related cases, that Court was well aware of the *Anton* case.

> "The Court [First Circuit] mistakenly refers to the military person as the shipper, although it seems clear that the goods were, as here, shipped on a government bill of lading at a declared value of 60 cents per pound pursuant to a general tender to the DOD. No mention is made in the opinion of section 22, and apparently it was not called to the court's attention. Had it been, we are confident that the result in *Anton* would have been different." (*See* Petitioners' Brief at A48-49)

Reproduced in the following Appendix at A3 *et seq.* is the relevant portion of appellant Greyhound Van Lines, Inc.'s brief in *Anton v. Greyhound Van Lines,*

Inc., supra. It may be noted that the appellant-carrier argued only that it had complied with the requirements of 49 U.S.C. §20(11), and not that 49 U.S.C. §22 allowed the carrier and the Government to contract for a limitation of liability apart from the requirements of 49 U.S.C. §20(11).

CONCLUSION

For all the foregoing reasons, Respondent, Engel Van Lines, Inc., respectfully requests that a Writ of Certiorari not be issued to review the order of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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APPLICATION OF TENDER (Continued)

(h) CARRIER'S PUBLISHED TARIFF vs. SECTION 22 QUOTATION

Whenever the TOTAL charge of a shipment under the carrier's published tariff is lower than the TOTAL charge for such shipment under the rates provided in this Tender, the TOTAL charge developed by use of the carrier's published tariff will apply.

(i) DEFINITION OF WEIGHTS

All rates and charges herein are based on the net weight (sometimes referred to as actual weight) of the shipment subject to minimum weight as provided herein. Net weight includes the weight of the goods plus cartons, barrels, fiber drums, wardrobes, crates (mirror, marble, etc.), wooden boxes (when approved by the shipping officer), used to pack linens, books, bedding mattresses, lamp shades, draperies, glassware, chinaware, bric-a-brac, table lamp bases, kitchenware and other fragile articles, and the necessary packing and filler material incident thereto. Nothing else will be included in the net weight.

(j) DECLARED OR RELEASED VALUE ON SHIPMENTS MOVING ON GOVERNMENT BILLS OF LADING, GOVERNMENT PURCHASE ORDERS, OR COMMERCIAL BILLS OF LADING ENDORSED TO BE CONVERTED TO A GOVERNMENT BILL OF LADING PRIOR TO DELIVERY

(A) Shipments moving on Government Bills of Lading, Government Purchase Orders or Commercial Bills of Lading endorsed to be converted to a Government Bill of Lading prior to delivery, will be deemed released to a value of 60 cents per pound per article, unless otherwise specifically annotated on the Government Bill of Lading.

(B) If the shipment is expressly released to a declared lump sum value for the entire shipment, and the value declared is less than $1.25 times the net weight (in pounds) of the shipment, such declaration will be ineffective, and the shipment will be deemed instead to have been released to a declared lump sum value equal to $1.25 times the net weight (in pounds) of the shipment.

(C) When the shipment is expressly released to a valuation in excess of 60 cents per pound per article, additional valuation charges as provided for in Item 320, Section II of Tender will apply.

(D) The carrier's maximum liability shall be either, (1) $1.25 times the net weight (in pounds) of the shipment or the declared lump sum value, whichever is greater, or (2) sixty (60) cents per pound for the net weight of any lost or damaged article or articles if the shipment has not been expressly released to a declared lump sum value.

(E) The released value and the carrier's maximum liability (whether or not loss or damage occurred from carrier negligence), as determined under this item, shall apply to claims resulting from the performance by carrier of any services, including accessorial services, which carrier has contracted to perform.

(k) DECLARED OR RELEASED VALUE ON SHIPMENTS MOVING ON COMMERCIAL BILLS OF LADING AS PROVIDED FOR IN PARAGRAPH (g) OF THIS TENDER

(A) On shipments moving on Commercial Bills of Lading containing certification as provided for in Paragraph (g) of this Tender, the released value must be entered on the Commercial Bill of Lading in the following form and may be completed only by the person signing the Commercial Bill of Lading.

The shipment will move subject to the rules and conditions of the carrier's tariff.
Shipper hereby releases the entire shipment to a value not exceeding

_____
(To be completed by the person signing below)

NOTICE: THE SHIPPER SIGNING THIS CONTRACT MUST INSERT IN THE SPACE ABOVE, IN HIS OWN HANDWRITING, EITHER HIS DECLARATION OF THE ACTUAL VALUE OF THE SHIPMENT, OR THE WORDS "60 cents per pound per article." OTHERWISE, THE SHIPMENT WILL BE DEEMED RELEASED TO A MAXIMUM VALUE EQUAL TO $1.25 TIMES THE WEIGHT OF THE SHIPMENT IN POUNDS.

_____
(Shipper)

_____
(Date)

(B) If the shipper fails to make the entry required in subsection (A) of this item, the shipment will be deemed released to an amount equal to $1.25 times the net weight of the shipment (in pounds).

(C) If the shipment is expressly released to a declared lump sum value for the entire shipment, and the value declared is less than $1.25 times the net weight (in pounds) of the shipment, such declaration will be ineffective, and the shipment will be deemed instead to have been released to a declared lump sum value equal to $1.25 times the net weight (in pounds) of the shipment.

(D) When the shipment is deemed released or is expressly released to a valuation in excess of 60 cents per pound per article, additional valuation charges as provided for in Item 320, Section II of Tender will apply.

(E) The carrier's maximum liability shall be either, (1) $1.25 times the net weight (in pounds) of the shipment or the declared lump sum value, whichever is greater, or (2) sixty (60) cents per pound for the net weight of any lost or damaged article or articles if the shipment has been expressly released by the shipper to such value per article.

(F) The released value and the carrier's maximum liability (whether or not loss or damage occurred from carrier negligence), as determined under this item, shall apply to claims resulting from the performance by carrier of any services, including accessorial services, which carrier has contracted to perform.

member on DD Form 1299.) The released valuation will be no less than the following:

1. INTERSTATE WITHIN CONUS—60 cents per pound per article. (Released valuation will not be shown on the GBL when the governing Military Rate Tender provides that shipments will be deemed released to a value of 60 cents per pound per article, unless otherwise specifically annotated on the GBL).

**2.* INTRASTATE—Released valuation will be at the amount cited in the carrier's rate tariff or tender. Shipments tendered to a carrier at rates cited in the applicable Household Goods Carrier Bureau and Mover's and Warehousemen's Association of America rate tenders are deemed released to a value of 60 cents per pound per article unless otherwise specifically annotated on the GBL.

3. INTERNATIONAL TGBL—30 cents per pound per article.

Note. Additional charges resulting from released valuation in excess of the prescribed minimums will be collected from the member by the appropriate military service finance center, except for those members no longer in pay status.

(c) *Professional books, papers, and equipment (PBP&E).* When the shipment contains PBP&E, enter "Weight includes _____ pounds of professional books, papers, and equipment." The carrier will insert the weight. When the actual weight is not readily available, a constructive weight based on 25 pounds per cubic foot will be used.

(d) *Service data.* Enter the following:

REQUESTED PICKUP DATE:
REQUIRED DELIVERY DATE:
DATE OF DELIVERY INTO SIT:

The ITO will enter the specified pickup and delivery dates. The carrier will enter the actual date of delivery into SIT and/or residence as applicable.

(e) *Customer Identification Code (CIC).* Rescinded.

(f) *Special authorization.* For shipment citing Army or Air Force appropriation (Key (11) above) made from or consigned to a point not specified in the change of station order, enter "Shipment authorized from (city/military installation and State/country) to (city and State/country)."

(g) *Use of Government-owned containers.* When Government-owned containers are used for shipment moving in TGBL service, annotate the GBL in accordance with the applicable Military Rate Tender. Also, the number and type of containers will be entered.

(h) *For Army and Air Force shipments only.* For shipments to or from oversea areas where service administrative weight limitations are in effect, add the following notation in the body of the GBL: "Maximum administrative weight allowance for household goods and unaccompanied baggage is (insert weight lbs.)." (Reference: M8003–2, JTR.)

Note. This provision is not applicable to those shipments for members being returned from oversea weight limitation areas for separation in a "non-pay" status.

(i) *Export-import annotations.*

1. For shipments moving by air, originating in CONUS and destined overseas, enter in capital letters: "FOR EXPORT."

2. For shipments moving by air, originating overseas and destined to CONUS, enter in capital letters: "IMPORTED BY AIR."

**(j)* For Navy shipments enter "Rank/Rate Code____" This code is the one digit alpha character immediately following the appropriation and subhead in the accounting data contained in the member's orders, e.g., NDH3 1731453.2252 G (Rank/Rate Code) 000022, etc." For consolidated shipments on separate GBLs, make an entry at bottom of the "Description of Articles" box, "NOTE: Shipment consolidated with GBL(s) # _____."

(k) *Firearms.* When the shipment contains firearms, enter—"This shipment contains firearms."

(14) *Key (14). NUMBERS OF PACKAGES AND WEIGHTS.* In the column headed "NUMBER OF PACKAGES" enter "GROSS," "TARE," and "NET." Also, for containerized shipment, enter "TOTAL NO. OF CONTAINERS" and "GROSS CUBE." The carrier will insert the weight, container, and cube information in the column headed "WEIGHTS."

(15) *Key (15). FOR USE OF DESTINATION CARRIER ONLY.* This section will be left blank for carrier use. The carrier will enter data as required for billing and by the

EXCERPT FROM BRIEF FILED ON BEHALF OF APPELLANT GREYHOUND VAN LINES, INC. IN *ANTON v. GREYHOUND VAN LINES, INC.*, No. 77-1409 (1st Cir. 1978)

ARGUMENT

I. THE DEFENDENT PROPERLY LIMITED ITS LIABILITY IN THIS CASE TO $.60 PER POUND PURSUANT TO THE PROVISIONS OF THE CARMACK AMENDMENT TO THE INTERSTATE COMMERCE ACT, 49 U.S.C. §20(11), WHEN THIS LIMITATION WAS AGREED TO IN WRITING BY THE DEFENDANT AND THE UNITED STATES AIR FORCE, THE PLAINTIFF'S AGENT FOR THE SHIPMENT OF HER GOODS, NOTWITHSTANDING THE FACT THAT THE PLAINTIFF HAD NO ACTUAL KNOWLEDGE OF THE LIMITATION.

The extent of Greyhound's liability in this case is controlled by the Carmack Amendment to the Interstate Commerce Act, 49 U.S.C. §20(11). It provides in pertinent part:

> Any common carrier . . . shall be liable . . . for any loss, damage, or injury to any property [shipped goods]. Provided, however, that the provisions hereof respecting liability for actual loss, damage or injury, notwithstanding any limitations of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply . . . second, to property . . . received for transportation concerning which the carrier shall have been or shall hereafter be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case

> such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not to exceed the value so declared or released. . . .

The Carmack Amendment imposes a single uniform federal regulation upon the obligations of interstate carriers for the destruction of shipped goods. *Adams Express Co. v. Croninger*, 226 U.S. 491 (1913); *New York, New Haven and Hartford R.R. v. Nothnagle*, 346 U.S. 128 (1953); *Atchison, Topeka and Santa Fe R.R. v. Herald*, 241 U.S. 371 (1916); *Southern R.R. v. Prescott*, 240 U.S. 637 (1916); *American Synthetic Rubber Corp. v. Louisville and Nashville R.R.*, 422 F.2d 462 (6th Cir. 1970); *Rocky Ford Moving Vans, Inc. v. United States*, 501 F.2d 1369 (8th Cir. 1974).

A common carrier, pursuant to the Carmack Amendment, becomes liable for "any loss, damage, or injury" to shipped goods in its possession. However, the Carmack Amendment enables the carrier to limit its liability for such loss. In order for the carrier to properly limit its liability, it must have an approved tariff schedule on file with the Interstate Commerce Commission establishing and maintaining rates "dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property" and the goods must have been shipped under the tariff schedule. Such limitations are valid and binding even where the limits are disproportionate to the actual value of the shipment. *Pierce Co. v. Wells Fargo and Co.*, 236 U.S. 278 (1915); *Lux Art Van Service, Inc. v. Pollard*, 344 F.2d 883 (9th Cir. 1965), *cert denied*, 382 U.S. 837 (1966).

Therefore, in order for Greyhound to successfully limit its liability in this case, it is simply necessary for Greyhound to establish that it had an approved tariff schedule on file with the Interstate Commerce Commission which afforded customers a choice of rates depend-

ing upon the released value of the goods shipped and establish that the plaintiff's household goods were shipped under the tariff schedule. It is well established that shippers are charged with notice of terms, conditions, and regulations contained in the tariff schedule pertaining to the carrier's liability which affect the rates of carriage and are bound by them. A shipper is presumed to have knowledge of the existence of alternate rates, based upon the declared value of the goods, and is therefore limited in recovery against a carrier in case of loss, to the amount shown by the tariff schedule as applicable to the rate charged. *American Railway Express Co. v. Daniel*, 269 U.S. 40 (1925); *American Railway Express Co. v. Lindhenburg*, 260 U.S. 584 (1923).

There is no requirement that the shipper actually sign the bill of lading which establishes the liability limits. *American Railway Express Co. v. Lindhenburg*, 260 U.S. 584 (1923).

In *Rocky Ford Moving Vans, Inc. v. United States*, 501 F.2d 1369 (8th Cir. 1974), it was shown that the shipper, an air force officer, had signed a bill of lading and had released his goods at a value of $.60 per pound and recovery was accordingly limited. However, the Court indicated that recovery would likewise have been limited without a showing that the officer had signed the bill of lading with a released value since the shipment in question was released under a United States Government Bill of Lading issued pursuant to an approved tariff schedule which provided that such shipments were "deemed released at a value of $.60 per pound per article unless otherwise specified on the bill". 501 F.2d at 1373 n7.

The defendant is not unmindful of the Supreme Court's observations in *New York, New Haven and Hartford R.R. v. Nothnagle*, 346 U.S. 128 (1953), where the Court indicated that a common carrier, to successfully limit its liability, must grant "its customers a fair

opportunity to choose between higher or lower liability by paying a correspondingly greater or lesser charge". Nevertheless, it still remains immaterial whether Juliet Anton, the plaintiff in this case, was ever personally aware of the $.60 per pound liability limitation. It is well established law that an agent who has authority to ship goods has authority to agree upon the terms of the shipment for its principal. *Great Northern Railway v. O'Connor*, 232 U.S. 508 (1914); *Lux Art Van Service, Inc. v. Pollard*, 344 F.2d 883 (9th Cir. 1965) (dicta), *cert denied*, 382 U.S. 837 (1966); *Lucien Piccard Watch Corp. v. American Airlines, Inc.*, 328 N.Y.S.2d 74, 68 Misc. 2d 664 (1972); *Universal Limited, Inc. v. S. Stern & Co.*, 311 N.Y.S.2d 317, 34 A.D. 2d 770 (1970); *Oregon Shortline Railway v. Blyth*, 118 P. 639 (Wyo. 1911); *Russell v. Erie R. Co.*, 59 A. 150 (N.J. 1904); *California Powder Works v. Atlantic and Pacific Ry.*, 45 P. 691 (Cal. 1896).

The fact surrounding the shipment of goods and the issuing of the various bills of lading in this case is not difficult to ascertain. The plaintiff, in connection with her release from active duty from the United States Air Force, directed the Air Force to place all of her household belongings in permanent storage at the Alabama Transfer & Warehouse Company in Montgomery, Alabama. (Statement of Agreed Facts, App. I-K) The plaintiff was subsequently notified by the Air Force that her goods could no longer remain in permanent storage at Government expense and that it would be necessary for her to make suitable arrangements to remove these goods from storage. (Transcript at 68, App. II-B) Accordingly, the plaintiff notified the Traffic Management Office at Maxwell Air Force Base that she wanted to have her goods removed from storage and, at Government expense, shipped to a warehouse in Manchester, New Hampshire. (Exhibit 6, App. III-D; Transcript at 75, App. II-B) Acting on this request, the United States Air

Force contacted Triple A Associates Moving & Storage Company, Greyhound's agent, and requested that Greyhound perform these services. (Swanner deposition at 10, App. II-F) The Traffic Management Office at Maxwell Air Force Base prepared a Government Bill of Lading and delivered it to Greyhound's agent. (Swanner deposition at 12, App. II-F) Although it appears unlikely that the Government Bill of Lading actually had the $.60 per pound limitation on liability inserted in it when it was issued, it is indisputable that the Government Bill of Lading made reference to Military and Government Rate Tariff No. 1-F and indicated that the shipment was being made pursuant to the terms of the tariff. (Exhibit 29, App. III-O) Following receipt of the Government Bill of Lading, Greyhound prepared its own internal bill of lading which was necessary in order to affix their ICC number to the shipment. (Exhibit 4, App. III-C; Swanner deposition at 17, App. II-F; Transcript at 311-312, App. II-G) The Greyhound Bill of Lading contains no liability limitation other than reference back to the Government Bill of Lading and the Military and Government Rate Tariff. While being shipped under the authority extended by the Government Bill of Lading, the plaintiff's goods were damaged.

It is also undisputed that the Military and Government Rate Tariff No. 1-F was properly on file with the Interstate Commerce Commission at all relevant times and that Greyhound was a participant in this tariff. (Transcript at 307, App. II-G; Exhibit 37 at 11, App. III-P) The District Court made a finding to this effect at page 345 in the transcript. (App. II-H) The tariff provides:

> (a) Shipments moving on Government Bills of Lading, Government Purchase Orders or Commercial Bills of Lading endorsed to be converted to a Government Bill of Lading prior to delivery, will be deemed released to a value of $.60 per pound per ar-

ticle, unless otherwise specifically annotated thereon.

(Exhibit 37 at 28, App. III-T)

Representatives from Greyhound Van Lines, John Swanner and James Bourdon, testified that all shipments for military members travel on Government Bills of Lading and that liability is limited to $.60 per pound. (Swanner deposition at 14, App. II-F; Transcript at 314, App. II-G) Mr. Bourdon testified as to the arrangements which could have been made to have the liability limits increased with proportionate increases in the amount charged for the shipment. (Transcript at 317, App. II-G)

Following the loss, the United States Air Force computed Greyhound's liability based upon the $.60 per pound limitation contained in the applicable rate tariff. (Exhibit 39, App. III-R) This liability, $2,896.03, was paid by Greyhound to the United States Government for the loss. (Transcript at 319, App. II-G)

Mr. Swanner testified that he believed that the United States Air Force was acting as an agent for the plaintiff in connection with her shipment and that the Air Force had the authority to have the goods released at a liability limit of $.60 per pound. (Swanner deposition at 20, App. II-F) Furthermore, the District Court, after hearing all of the evidence, found that "the plaintiff, Miss Anton, did make the United States Air Force her agent" in connection with this shipment. (Transcript at 349, App. II-H) The Court further found that Greyhound had properly limited its liability with the United States Air Force to $.60 per pound but that, since the plaintiff was not aware of the limitation, the defendant could not benefit from the limitation. (Transcript at 349, App. II-H) Accordingly, a directed verdict on the issue of liability was entered in the plaintiff's favor. It is submitted that this constitutes error as a matter of law.

The defendant has been able to locate two cases which appear to be directly on point. The case of *Holmes*

v. National Van Lines, Inc., 350 P.2d 864 (Wash. 1960), involves an employee of Boeing Aircraft Company who was transferred by his employer. The employer made all arrangements for the shipment of the employee's household goods. As in this case, Boeing selected the carrier, negotiated the terms of carriage and paid the carrier's fee. The Court found that:

> Boeing was, beyond all question, the agent of the shipper in selecting the carrier and in negotiating the terms of the carriage, and in paying for the same.

350 P.2d at 866. The bill of lading pertaining to these goods was not signed by either the employee or by Boeing. However, the Court, in limiting the carrier's liability to that provided in the bill of lading, stated:

> Signature is, of course, the best evidence of agreement, but is not required. . . . Neither is delivery to and acceptance of the bill of lading by the shipper, prior to shipment, necessary. . . . It is sufficient, if the writing expresses the agreement of the parties. (citations omitted)

350 P.2d at 866.

In *Norman v. Burham's Van Service*, 73 So.2d 640 (La. 1954), the plaintiff was a naval officer, who, upon release from active duty, was having his household goods shipped from Portsmouth, Virginia to New Orleans. As here, all arrangements for the shipment were made by the United States Navy and the Navy paid the carrier's costs. The Court held:

> In view of these facts, we can only come to the conclusion that the Navy Department, through its supply officer at Portsmouth, acted in the capacity of plaintiff's agent in the matter of the shipment and the plaintiff became effectively bound by whatever

> arrangements the supply officer had made with the carrier.
>
> . . . .
>
> A carrier has the right to assume that an agent or freight forwarder has the authority to agree upon the terms of the shipment for his principal.

73 So.2d at 643. Accordingly, the Court limited the carrier's liability to that established by the applicable tariff schedule, in that case $.30 per pound.

Furthermore, it should be noted that Government regulations provide members of the military with an option of shipping items of extraordinary value in a manner which will provide additional liability protection for the service member. However, these regulations provide that "increased valuation charges incurred over and above the carrier's lowest released valuation will be borne by the member". Personal Property Traffic Management Regulation, DOD4400.34-R, §4008(b). (App. III-N) To permit the plaintiff to recover more than the agreed limits of liability, after the benefits of the lower rates based on the $.60 per pound figure had been received, would "violate the plainest principles of fair dealing". *American Railway Express Co. v. Lindhenburg*, 260 U.S. 584, 592 (1923).

The defendant is well aware that there are numerous cases in which the owner of household goods is not bound by limitations in liability agreed to by the party arranging for the shipment. *Lux Art Van Service, Inc. v. Pollard*, 344 F.2d 883, *cert denied*, 382 U.S. 837 (1966). However, those cases involve situations where the shipper's agent had no actual authority to even ship the goods. In *Lux Art Van Service, Inc. v. Pollard*, the "agent" simply had possession of the item and had no authority to ship it.

In this case, the plaintiff entrusted the entire move to the United States Air Force. The Air Force made all contact with the defendant, issued the appropriate bill of

lading and paid the carrier for the services. The carrier, Greyhound, had a right to believe and did believe that the Air Force was the plaintiff's agent for all purposes in connection with the move and agreed with the Air Force that the goods would be released at $.60 per pound. Accordingly, the plaintiff should now be bound by the agreement between the carrier and the United States Air Force and Greyhound's liability should properly be limited to $.60 per pound or $2,896.03 which has already been paid.